DETERMINING LOSS WITHOUT LOSING YOUR MIND: THE APPRAISAL PROCESS FOR FIRST PARTY CLAIMS

By

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I. APPRAISAL PROCESS

A. What is appraisal?

Appraisal is a process permitted by a provision typically included in a property insurance policy which is used to resolve disputes between the insured and the insurer as to the amount of an insured loss. A disagreement as to the value of a property loss for which coverage is claimed under a policy would normally be the initiating event for the appraisal process. The appraisal language is most insurance policies is fairly similar. The following is the standard ISO form language for an appraisal provision:

> **2. Appraisal**
> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.
>
> Each party will:
>
> a. Pay its chosen appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim.

ISO Commercial Property, Building and Personal Property Coverage Form CP 00 10 04 02. Either the insured or the insurer can invoke this provision. Once invoked, each side selects a competent and impartial appraiser. Those two select an umpire to resolve disputes or a court will select one if they cannot agree. The parties agree to be bound by the decision of the umpire. Determination of the amount of loss or participation in the appraisal process does not preclude disputes over coverage for the loss, however.

B. Appraisal v. Arbitration

Appraisal and arbitration bear some similarity in as much as they are both alternate dispute resolution processes that allow disputes to be resolved without the necessity of litigation. There are significant differences between the two processes, however. Many courts and commentators have discussed the differences between the two and what each is intended to accomplish. Borrowing from the United States Court of Appeals for the Fifth Circuit, the Tennessee Court of Appeals has succinctly explained the differences as follows:

> Insurance appraisals are generally distinguished from arbitrations. While both procedures aim to submit a dispute to a third party for speedy and efficient resolution without recourse to the courts, there are significant differences between them. For example, an arbitration agreement may encompass the entire controversy between parties or it may be tailored to particular legal or factual disputes. In contrast, an appraisal determines only the amount of loss, without resolving issues such as whether the insurer is liable under the policy. Additionally, an arbitration is a quasi-judicial proceeding, complete with formal hearings, notice to parties, and testimony of witnesses. Appraisals are informal. Appraisers typically conduct independent investigations and base their decisions on their own knowledge, without holding formal hearings. (Citations and footnotes omitted).*Hartford Lloyd's Ins. Co. v. Teachworth,* 898 F.2d 1058, 1061–62 (5th Cir.1990). *See also Casualty Indem. Exch. v. Yother,* 439 So.2d 77, 79–80 (Ala.1983); *Kawa v. Nationwide Mut. Fire Ins. Co.,* 174 Misc.2d 407, 664 N.Y.S.2d 430, 431–32 (Sup.Ct.1997).

Merrimack Mutual Fire Insurance Company v. Batts, 59 S.W.3d 142 (Tenn. App. 2001).

In *Merrimack* the court determined that an insurance appraisal provision is not an agreement to arbitrate:

> While we recognize that some jurisdictions, perhaps out of their enthusiasm for alternative dispute resolution procedures, have blurred the distinction between arbitration proceedings and appraisal proceedings, we find it unnecessary and even inappropriate to abandon the workable distinction between the two in this case. When Merrimack drafted its insurance policy, it did so relying on the generally prevailing understanding that an appraisal was just that-an appraisal, not binding arbitration. We decline, on these facts, to upset this settled expectation.

Id. at 150.

There are two major differences between appraisal and arbitration. First, unlike arbitration, appraisal is not a quasi-judicial proceeding. Instead, the parties only contract for a third person to determine the value of the property or amount of the "loss" -a contract term- according to the method provided in the policy. Johnny Parker, *Understanding the Insurance Policy Appraisal Clause: A Four-Step Program,* 37 U. Tol. L. Rev. 931 (2006).

> Appraisal is intended to take place before suit is filed. Appraisals require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings. It would be a rare case in which appraisal could not be completed with less time and expense than it would take to file motions contesting it.

State Farm Lloyds v. Johnson, 290 S.W.3d 88652, Tex. Sup. Ct. J. 1042 (Tex. 2009).

Second, an appraisal is not a means of resolving the issues of liability or coverage under an insurance policy. Rather, an appraisal only determines the amount of an acknowledged liability which has not been agreed upon by the parties. Johnny Parker, *Understanding the Insurance Policy Appraisal Clause: A Four-Step Program,* 37 U. Tol. L. Rev. 931 (2006).

II. LEGAL ISSUES

A. Scope of Appraisal

When invoking an appraisal provision in a property insurance policy it is important to understand what you are asking for and what you will get. As a general rule, the sole purpose of an appraisal is to determine the amount of damage. 15 *Couch on Ins.* § 210:42 (2014). In any case, however, the authority of the appraisal is limited to the specific authority granted by the insurance policy language. Tennessee addressed this *Merrimack Mutual Fire Insurance Company v. Batts*:

> An appraiser's authority is limited to the authority granted in the insurance policy or granted by some other express agreement of the parties. The appraisal clause in Ms. Batts's homeowners policy is limited to determining the "amount of the loss"—the monetary value of the property damage. It does not vest the appraisers with the authority to decide questions of coverage and liability, and there is no evidence that Merrimack and Ms. Batts agreed independently to give this authority to Messrs. Keys, Horton, and Ward. Without evidence of the some agreement by the parties, there is no legal or factual basis for concluding that the appraisers were empowered to decide coverage questions.
>
> More than four decades ago, in a casualty insurance case similar to this one, the Mississippi Supreme Court held that appraisers did not have the authority to decide liability and coverage questions because "nowhere in the standard [policy] for submission to appraisal is any power vested in or conferred upon the appraisers to determine the cause of the loss...." *Munn v. National Fire Ins. Co.,* 237 Miss. 641, 115 So.2d 54, 56 (1959). Other courts construing standard appraisal provisions similar to the one involved in this case have consistently agreed that appraisers have no power to decide coverage or liability issues. *E.g.,* *153 *Jefferson Ins. Co. v. Superior Court,* 3 Cal.3d 398, 90 Cal.Rptr. 608, 475 P.2d 880, 883 (1970); *Commonwealth Ins. Co. v. Soloman,* 119 A. 850, 853 (Del.1923); *Opar v. Allstate Ins. Co.,* 751 So.2d 758, 761 (Fla.Dist.Ct.App.2000); *St. Paul Fire & Marine Ins. Co. v. Wright,* 97 Nev. 308, 629 P.2d 1202, 1203 (1981); *Elberon Bathing Co. v. Ambassador Ins. Co.,* 77 N.J. 1, 389 A.2d 439, 446 (N.J.1978); *Minot Town & Country v. Fireman's Fund Ins. Co.,* 587 N.W.2d 189, 190 (N.D.1998); *Kentner v. Gulf Ins. Co.,* 66 Or.App. 15, 673 P.2d 1354, 1356 (1983); *Wells v. American States Preferred Ins. Co.,* 919 S.W.2d 679, 683 (Tex.App.1996); *Domke on Commercial Arbitration* § 1:02, at 6–7. One court has suggested that disputed coverage and liability issues are best submitted to the courts before any dispute regarding the amount of the loss is submitted to the

> appraisers. *Auto-Owners Ins. Co. v. Kwaiser,* 190 Mich.App. 482, 476 N.W.2d 467, 469 (1991).

Merrimack Mutual Fire Insurance Company v. Batts, 59 S.W.3d at 152-153. Therefore, while appraisal is an excellent way to determine the amount of loss, in virtually all cases appraisers are not given the authority to decide what is covered under the terms and conditions of the insurance policy.

1. Amount of loss v. Coverage

The amount of loss is the sole issue for most appraisals and is typically the extent of authority granted to an appraiser under the language of an insurance policy. "[W]hen the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid.' " *Johnson v. Nationwide Mut. Ins. Co.,* 828 So.2d 1021, 1025 (Fla. 2002) (quoting *Gonzalez v. State Farm Fire & Cas. Co*., 805 So.2d 814, 816-17 (Fla. 3d DCA 2000)). *Florida Ins. Guar. Ass'n, Inc. v. Olympus Ass'n, Inc*., 34 So. 3d 791 (Fla. 4th DCA 2010). See also, *Hawkinson Tread Tire Service Co. v. Indiana Lumbermen's Mutual Insurance Co.,* 362 Mo. 823, 245 S.W.2d 24 (1951) (Missouri law is clear that whether the appraisal provision of an insurance policy applies depends upon whether the dispute between the insurer and insured is properly characterized as a coverage dispute or a disagreement over the amount of the loss.)

When the existence of coverage is not disputed, the amount of loss is to be determined. When the existence of coverage is disputed along with the amount of loss, the question becomes whether the appraiser has the right to make a determination of coverage or liability under the policy. This has been addressed by the courts of a number of states:

> Having considered the holding of other jurisdictions regarding the scope of an appraiser's rights and duties under an appraisal clause in an insurance policy, we conclude that the more persuasive authority is the authority holding that an appraiser's duty is limited to determining the "amount of loss"—the monetary value of the property damage—and that appraisers are not vested with the authority to decide questions of coverage and liability; we thus adopt that holding as our rule of law. Questions of coverage and liability should be decided only by the courts, not appraisers. This holding is consistent with the longstanding principle that "[t]he court must enforce the insurance policy as written if the terms are unambiguous." *Safeway Ins. Co. of Alabama v. Herrera,* 912 So.2d 1140, 1143 (Ala.2005)**.**

Rogers v. State Farm Fire and Casualty, 984 So.2d 382 (Ala. 2007). The Supreme Court of Minnesota also addressed the issue and found as follows:

> Issues relating to coverage challenges are questions exclusively for the judiciary. *State Farm Fire & Cas. Co. v. Licea,* 685 So.2d 1285, 1287 (Fla.1996). The scope of appraisal is limited to damage questions while liability questions are reserved for the courts. *See Itasca Paper Co. v. Niagara Fire Ins. Co.,* 175 Minn. 73, 77–78, 220 N.W. 425, 426–27 (1928). We generally agree that appraisers have authority to decide the "amount of loss" but may not construe the policy or

> decide whether the insurer should pay. *See, e.g., Mork v. Eureka–Sec. Fire & Marine Ins. Co.,* 230 Minn. 382, 384, 42 N.W.2d 33, 35 (1950); 15 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 213:44 (3d ed. 1999) ("An appraiser can make no legal determinations.").

Quade v. Secura Ins., 814 N.W.2d 703 (Minn. 2012). While determinations of the amount of loss are clearly permitted and required by appraisal provisions, determinations of whether coverage exists are most always reserved for the judicial determination.

2. Causation

There are times when the determination of the loss amount may be inextricably intertwined with a determination of whether a loss is covered under the policy. Consider the situation where there is a loss which is the result partly of damage covered under a policy, and partly from some other cause. May an appraiser in this scenario make a determination of causation that would allow the division of covered and uncovered loss? The answer is likely to be that this is permitted. In Minnesota when this issue was addressed it was determined that the issues may well be so inextricably intertwined that an appraiser must be permitted to make this determination:

> The record in this case suggests that the dispute here involves both a question of damages and a question of liability. The Quades assert that the damage to the roofs is a covered loss for wind damage. Secura asserts that the damage to the roofs is due to wear and tear and is excluded under the policy. We believe that under the circumstances of this case a determination of the "amount of loss" under the appraisal clause necessarily includes a determination of causation. Coverage questions, such as whether damage is excluded because it was not caused by wind, are legal questions for the court as this case goes forward. The Quades are incorrect that appraisers can never allocate damages between covered and excluded perils. In this case, the causation question involves separating loss due to a covered event from a property's preexisting condition. Adopting the Quades' interpretation would render appraisal clauses inoperative in most situations, and that result is in direct conflict with the public policy behind the appraisal process and the fact that we have repeatedly encouraged its use in Minnesota."

Quade v. Secura Insurance, 814 N.W.2d 703 (Minn. 2012).

Courts in the state of Texas also took up this issue and found that determinations of the causation of loss and the amount of loss may be so inextricably intertwined that appraiser may have to decide what caused the harm when there are multiple causes of injury to an item of property:

> Under Texas law, whether causation is a liability question reserved for the court or a damage question that may be made by appraisers in rendering an appraisal award pursuant to an insurance policy depends on the circumstances, and thus, when different causes are alleged for a single injury to property, causation is a

> liability question for the courts, and appraisers can decide the cost of repairs in this context, but if they could also decide causation there would be no liability questions left for the courts; by contrast, when different types of damage occur to different items of property, appraisers may have to decide the damage caused by each before the courts can decide liability, and in this context, courts can decide whether a particular type of damage is covered, but if they could also decide the amount of damage caused by each, there would be no damage questions left for the appraisers.

MLCSV10 v. Stateside Enterprises, Inc., 866 F. Supp. 2d 691 (S.D. Tex. 2012). See also, *Jones v. Nationwide Mutual Insurance Company*, 828 So.2d 1021 (Fla. 2002) (causation is a coverage question for the court when an insurer wholly denies that there is a covered loss and an amount-of-loss question for the appraisal panel when an insurer admits that there is covered loss, the amount of which is disputed).

B. Waiver

A frequent point of contention between insurers and insureds in the context of appraisal is whether one side or the other has waived the appraisal process in some way. The waiver allegation may arise due to allegations that the appraisal provision was not invoked in a reasonable period of time or because of the initiation of or participation in litigation prior to making a demand for appraisal. There is little uniformity among jurisdictions as to whether waiver may be found, with some jurisdictions readily finding waiver when there has been action taken which is inconsistent with an appraisal demand while other jurisdictions make waiver nearly impossible.

1. Waiver by litigation

When waiver is allowed, there is greater uniformity as to what standard is to be used to determine if there has been a waiver of appraisal. Typically the standard will be the same as that which applies to arbitration clauses. There is an excellent discussion of this in *Rogers v. State Farm Fire and Casualty*, 984 So.2d 382(Ala. 2007):

> The Rogers argue that State Farm waived its right to invoke the appraisal process by waiting until over 14 months after litigation had commenced, and almost 2 years after the tornado occurred, to demand invocation of the appraisal clause. Although this Court has never ruled on what standard should be applied to determine whether there has been a waiver of the right to invoke an appraisal clause in an insurance policy, the former Court of Appeals previously indicated that the same standard applies to both appraisal and arbitration clauses. See *Chambers v. Home Ins. Co. of New York,* 29 Ala.App. 34, 37, 191 So. 642, 644 (1939) ("[A] denial of liability by an insurer on a policy of insurance, issued by the insurer, amounts to a waiver of an arbitration, or appraisal, clause incorporated in said policy.").

Courts in other jurisdictions, both state and federal, have applied the same standard for determining whether there has been a waiver of the right to invoke an appraisal clause as they have applied to determining whether there has been a waiver of the right to invoke an arbitration clause. See, e.g., *J. Wise Smith & Assocs. v. Nationwide Mut. Ins. Co.,* 925 F.Supp. 528, 532 (W.D.Tenn.1995) (finding that the defendant waived its right to invoke the appraisal clause because it "was aware of the appraisal clause and could have sought to invoke it well before it did, avoiding unnecessary delay and expense for both parties"); *Lundy v. Farmers Group, Inc.,* 322 Ill.App.3d 214, 219–20, 750 N.E.2d 314, 319, 255 Ill.Dec. 733, 738 (2001) ("Our research has not revealed any Illinois case that addresses waiver of an appraisal clause. Courts from other jurisdictions, however, have held that, like an arbitration clause, an appraisal clause may be waived.... [W]e conclude that these principles apply to appraisal clauses as well as arbitration clauses."); *Meineke v. Twin City Fire Ins. Co.,* 181 Ariz. 576, 580, 892 P.2d 1365, 1369 (Ariz.Ct.App.1994) (holding that because "appraisal is analogous to arbitration" the court would "apply principles of arbitration law to this dispute regarding an insurance policy appraisal clause") (citing *Aetna Cas. & Sur. Co. v. Insurance Comm'r,* 293 Md. 409, 445 A.2d 14, 20 (1982); *Hanson v. Commercial Union *387 Ins. Co.,* 150 Ariz. 283, 285, 723 P.2d 101, 103 (Ariz.Ct.App.1986); *Hirt v. Hervey,* 118 Ariz. 543, 545, 578 P.2d 624, 626 (Ariz.Ct.App.1978)). See also 15 Lee R. Russ and Thomas F. Segalla, *Couch on Insurance* § 210.42 (3d ed.1999) (treating identically the standard for waiver of an arbitration provision and an appraisal provision). We find this authority persuasive in our consideration of the standard for determining whether there has been a waiver of an appraisal clause, and we apply the standard for determining whether there has been a waiver of an arbitration clause to the facts before us.

In *Companion Life Insurance Co. v. Whitesell Manufacturing, Inc.,* 670 So.2d 897, 899 (Ala.1995), this Court stated with regard to the waiver of the right to invoke an arbitration clause:

> "It is well settled under Alabama law that a party may waive its right to arbitrate a dispute if it *substantially invokes the litigation process and thereby substantially prejudices the party opposing arbitration.* Whether a party's participation in an action amounts to an enforceable waiver of its right to arbitrate depends on whether the participation bespeaks an intention to abandon the right in favor of the judicial process and, if so, whether the opposing party would be prejudiced by a subsequent order requiring it to submit to arbitration. No rigid rule exists for determining what constitutes a waiver of the right to arbitrate; the determination as to whether there has been a waiver must, instead, be based on the particular facts of each case. See *Huntsville Golf Development, Inc. v. Aetna Casualty & Surety Co.,* 632 So.2d 459 (Ala.1994); *Ex parte McKinney,* 515 So.2d 693 n. 2 (Ala.1987); *Ex parte Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 494 So.2d 1 (Ala.1986); *Ex parte Costa & Head (Atrium), Ltd.,* 486 So.2d 1272 (Ala.1986), overruled on other grounds, *Ex parte Jones,* 628 So.2d 316 (Ala.1994). In accord, see *S & H Contractors, Inc. v. A.J. Taft Coal Co.,* 906 F.2d 1507 (11th Cir.1990), cert. denied, 498 U.S. 1026, 111 S.Ct. 677, 112 L.Ed.2d 669 (1991)."

(Emphasis added.) See also *Ocwen Loan Servicing, LLC v. Washington,* 939 So.2d 6, 14 (Ala.2006).

Rogers v. State Farm Fire and Casualty, 984 So.2d 382 (Ala. 2007). The key determination for a finding waiver in jurisdictions using this standard becomes whether there has been substantial prejudice to the opposing party because of the failure to invoke the appraisal process earlier.

Florida seemingly applies a different standard, however. This standard is one far more likely to determine there has been no waiver, as the requirement of a finding of prejudice has seemingly been removed and the issue becomes whether there has been action taken which is inconsistent with the demand for appraisal:

> In the context of arbitration, a waiver of the right to arbitrate occurs when a party actively participates in a lawsuit or engages in conduct inconsistent with the right to arbitrate. *Raymond James Fin. Servs., Inc. v. Saldukas,* 896 So.2d 707, 711 (Fla.2005). Active participation in a lawsuit is considered a waiver because it is generally presumed to be inconsistent with the right to arbitrate. *Thomas,* 898 So.2d at 162; *see, e.g., Morrell v. Wayne Frier Manufactured Home Ctr.,* 834 So.2d 395, 395–98 (Fla. 5th DCA 2003) (finding waiver where party litigated for eleven months with various motions and pleadings); *ARI Mut. Ins. Co. v. Hogen,* 734 So.2d 574, 576 (Fla. 3d DCA 1999) (finding waiver when party engaged in "aggressive" litigation for nine months with pleadings, interrogatories, requests for productions, sought hearings, and contested other party's motions and pleadings); *Owens & Minor Med., Inc. v. Innovative Mktg. & Distribution Servs., Inc.,* 711 So.2d 176, 176 (Fla. 4th DCA 1998) (finding waiver when party litigated for thirteen months, secured prejudgment writ of garnishment, made multiple requests for admissions, filed pleadings and motions, and contested other party's pleadings and motions); *Gray Mart, Inc. v. Fireman's Fund Ins. Co.,* 703 So.2d 1170, 1171–73 (Fla. 3d DCA 1997) (finding waiver following fourteen months of litigation and demand for appraisal one month before trial).
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> As FIGA notes, the Brancos litigated their case for more than two years with multiple pleadings and discovery requests. However, the question of waiver of appraisal is not solely about the length of time the case is pending or the number of filings the appraisal-seeking party made. Instead, the primary focus is whether the Brancos acted inconsistently with their appraisal rights. *Saldukas,* 896 So.2d at 711; *see Am. Capital Assur. Corp. v. Courtney Meadows Apartment, L.L.P.,* 36 So.3d 704, 707 (Fla. 1st DCA 2010) (finding party did not waive right to appraisal as party had not acted inconsistently with right from time of demand).

Florida Ins. Guar. Ass'n v. Branco, 148 So.3d 488 (Fla. 5th DCA 2014).

> Unlike arbitration, "[a]ppraisal exists for a limited purpose-the determination of 'the amount of the loss.' " *Citizens Prop. Ins. Corp. v. Mango Hill 6 Condo. Ass'n,* 117 So.3d 1226, 1230 (Fla. 3d DCA 2013). Until the insurer has a reasonable opportunity to investigate and adjust the claim, there is no "disagreement" (for purposes of appraisal) regarding the value of the property or the amount of loss to be appraised. *Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n,* 48 So.3d 188, 191 (Fla. 3d DCA 2010) (reversing prematurely-ordered appraisal). An insurer that denies coverage does not need to seek appraisal before litigation because "[i]t would make no sense to say that [the insurer] was required to request ... appraisal on a loss it had already refused to pay." *Gonzalez v. State Farm Fire & Cas. Co.,* 805 So.2d 814, 817 (Fla. 3d DCA 2000); *see*

> *v. Sentry Ins. Mut. Co.,* 804 So.2d 476, 480 (Fla. 3d DCA 2001) (holding "an action to compel appraisal does not accrue until the policy conditions precedent have been performed or waived, and appraisal is then refused"). Absent contract language to the contrary, we see no reason why the insured should not have the same flexibility in cases when coverage is denied. *But see Cypress Pointe at Lake Orlando Condo. Ass'n v. Mt. Hawley Ins. Co.,* No. 6:10–cv–1459–Orl–36TBS, 2012 WL 6138993, at *2 (M.D.Fla. Nov. 19, 2012) (finding insured acted inconsistently with appraisal right by pursuing litigation for two years, though insurer consistently denied coverage).

Florida Ins. Guar. Ass'n v. Branco, 148 So.3d 488 (Fla. 5th DCA 2014).

2. Waiver by Delay

Even in the absence of litigation, some jurisdiction will find waiver by delay if a determination is made that a party has waited too long to request appraisal:

> Courts in other jurisdictions that have considered this question have concluded that where the policy does not provide a time for requesting an appraisal, the request must be made within a reasonable time. *Kester v. State Farm Fire & Cas. Co.,* 726 F.Supp. 1015, 1019 (E.D.Pa.1989); *Hanby v. Maryland Casualty Co.,* 265 A.2d 28, 30 (Del.1970); *Monroe Guar. Ins. Co. v. Backstage, Inc.,* 537 N.E.2d 528, 529 (Ind.Ct.App.1989); *School Dist. No. 1 v. Globe & Republic Ins. Co.,* 146 Mont. 208, 404 P.2d 889, 893 (1965). The timeliness of a demand for an appraisal depends upon the circumstances as they existed at the time the demand was made. *Kester,* 726 F.Supp. at 1019; *Keesling v. Western Fire Ins. Co.,* 10 Wash.App. 841, 520 P.2d 622, 626 (1974). Among the circumstances courts consider are the timing between the breakdown of good faith negotiations concerning the amount of the loss suffered by the insured and the appraisal demand, and whether any prejudice to the other party resulted from the delay in demanding an appraisal. *Kester,* 726 F.Supp. at 1019–20; *Monroe,* 537 N.E.2d at 529; *School Dist. No. 1,* 404 P.2d at 893; *Keesling,* 520 P.2d at 628.

Meineke v. Twin City Fire Ins. Co. , 181 Ariz. 576, 892 P.2d 1365 (Ariz. App. 1994). The finding of delay will most likely need to be coupled with a determination of prejudice. This was addressed in the Texas case *In re Universal Underwriters of Texas Ins. Co.* , 345 S.W.3d 404, 54 Tex. Sup. Ct. J. 931 (2011):

> Even if Universal had waited to request appraisal, mere delay is not enough to find waiver; a party must show that it has been prejudiced. *See* 15 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 210:77 (3d ed. 1999) ("In addition, a waiver will not be declared where there has been no showing of prejudice to the other party by a delay in demanding an appraisal."); *Terra,* 981 F.Supp. at 602 (requiring courts to examine "whether there would be any prejudice to the other party resulting from the delay in demanding an appraisal"). If the insured has suffered no prejudice due to delay, it makes little sense to prohibit appraisal when it can provide a more efficient and cost-effective alternative to litigation. Of course, prejudice to a party may arise in any number of ways that demonstrate harm to a party's legal rights or financial position. *See, e.g., Perry Homes v. Cull,* 258 S.W.3d 580, 597 (Tex.2008) (defining prejudice for purposes of waiver of arbitration as "the inherent unfairness in terms of delay, expense, or damage to a

> party's legal position" (quoting *Republic Ins. Co. v. PAICO Receivables, LLC,* 383 F.3d 341, 346 (5th Cir.2004))); *see also In re Tyco Int'l Ltd. Sec. Litig.,* 422 F.3d 41, 47 n. 5 (1st Cir.2005) ("[A] party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party." (*quoted in Perry Homes,* 258 S.W.3d at 597)); *Menorah Ins. Co., Ltd. v. INX Reinsurance Corp.,* 72 F.3d 218, 222 (1st Cir.1995) (finding prejudice where party "incurred expenses as a direct result of [opponent's] dilatory behavior").

In re Universal Underwriters of Texas Ins. Co. , 345 S.W.3d at 411. In those jurisdictions requiring a finding of prejudice for waiver, there will need to be a showing that an impasse was reached and a failure to timely demand appraisal which directly results in prejudice to the opposing party.

C. Selection of Appraisers and Umpires

Most insurance contracts restrict the choice to a "competent and impartial appraiser*".* This right of nomination is also variously described as the right to choose a *competent and independent* or *competent and disinterested* appraiser. Johnny Parker, *Understanding the Insurance Policy Appraisal Clause: A Four-Step Program,* 37 U. Tol. L. Rev. 931, 937. The general idea is that each party is not tasked with selecting an advocate for their position, but rather an appraisal with no interest in the case other than performing a fair valuation of the property at issue.

1. Competent

It should go without saying that the appraiser must be competent. Competence is fairly easy to judge by looking at the qualifications of an appraiser. Perhaps more enlightening is what does not make an appraiser incompetent. As an example, courts in Florida have determine that bias does not render an appraiser incompetent:

> In the absence of a contractual definition, we must presume that this word was intended to be used in its plain and ordinary way as can be ascertained by reference to a dictionary. *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, LLC,* 811 So.2d 719, 722 (Fla. 3d DCA 2002). The dictionary definitions of the word "competent" include "properly or sufficiently qualified or capable; adequate for the purpose; legally qualified or fit to perform an act," *The American Heritage Dictionary* 385 (3rd ed.1992), and "duly qualified; answering all requirements; having sufficient ability or authority; possessing the requisite natural or legal qualifications; able; adequate; suitable; sufficient; capable; or legally fit." *Black's Law Dictionary* 257 (5th edition 1979).
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> Based upon these definitions, the record clearly establishes that the homeowner's appraiser was competent by virtue of his unquestionable prior experience and/or expertise. Citizens' real complaint is, however, that this appraiser was not neutral or independent. Contrary to Citizens' suggestion on this appeal, competence is not synonymous with neutrality or independence. While the policy's language required that the appraisers selected by the parties

> be competent, it did not require them also to be neutral or independent. Indeed, the policy language only required that the umpire be both competent and independent.

Citizens Property Ins. Corp. v. M.A. & F.H. Properties, Ltd. , 948 So.2d 1017 (Fla. App. 2007). Determination of competence is based solely on the qualification of the appraisal.

Similarly, in ruling limited to the determination of the appraiser's competence, the Pennsylvania Superior Court has ruled that the existence of a contingency fee agreement does not render an appraiser incompetent:

> We hold that in the absence of contractual language specifically requiring impartiality, the existence of such an arrangement between an insured and his appointed appraiser does not, in and of itself, render the appraiser unfit. Simply proving that an appraiser is partial is not the same as proving that he is incompetent.

Hozlock v. Donegal Companies/Donegal Mut. Ins. Co. 2000 PA Super 25, 745 A.2d 1261(2000). Determinations of competence are limited to competence and partiality and bias do not affect evaluations of competence.

2. Disinterested

In addition to being competent, most appraisal provisions have language that requires the appraiser to be disinterested. In a ruling that should surprise no one, the Florida Court of Appeals has determined that an attorney for a party to an appraisal is not qualified as a disinterested appraiser: "The policy provision, which requires a "disinterested appraiser," expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested. Given the duty of loyalty owed by an attorney to a client, we conclude that attorneys may not serve as their clients' arbitrators or appraisers when "disinterested" arbitrators or appraisers are bargained for." *Florida Ins. Guar. Ass'n v. Branco,* 148 So.3d 488 (Fla.App. 5 Dist. 2014)

The manner in which an appraiser is compensated has also been found to disqualify an appraiser. In a ruling made while considering an appraisal clause that required party-appointed appraisers to be "competent and disinterested, the Supreme Court of Iowa has ruled that a contingency fee arrangement between an insured and his appointed appraiser renders the appraiser *per se* unfit. *Central Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257 (Iowa 1991). This is not a universal determination, however, as the courts in Florida have determine that a contingency fee does not mean that an appraiser is not disinterested. *Galvis v. Allstate Insurance Co.*, 721 So.2d 421(Fla. 3d DCA 1998)

An appraiser's ongoing work for one of the parties or pecuniary interest in the matter may also be disqualifying. Where an appraiser selected by an insurance company was simultaneously acting as an expert on the insurance company's behalf in two other cases, and this relationship was undisclosed to the policy holder, the California court of appeals determined that the appraiser was not "disinterested" as a matter of law. *Gebers v. State Farm General Insurance Company,* **38** Cal.App.4th 1648, 45 Cal.Rptr.2d 725 (1995).

3. Independent

Some policies require the appointment of an "independent" appraiser as opposed to a "disinterested" appraiser. There is an excellent, albeit lengthy, discussion of what constitutes an independent appraiser and whether an appraiser working for a contingency fee can be independent in the Florida Court of Appeals decision in *Rios v. Tri State Insurance Company*:

> The threshold question presented by the parties is how to interpret the term "independent appraiser" as used in the insurance policy. The parties are free by contract to specify the credentials of party-appointed appraisers, and have done so in this instance. *See, Lee v. Marcus,* 396 So.2d 208, 210 (Fla. 3d DCA 1981) (recognizing that parties may by contract place words of limitation on the identity, status, or qualifications of arbitrators). The insurance contract in this case restricts the choice to an "independent appraiser" but the policy contains no definition and neither the parties nor we have located case law addressing the point.
>
> Dictionary definitions of "independent" include "not subject to control, restriction, modification, or limitation from a given outside source," *Black's Law Dictionary* 770 (6th ed.1990), and "not subject to control by others...." *Webster's Third New International Dictionary* 1148 (1986). We conclude that this language calls for the appointment of an outside appraiser, unaffiliated with the parties. This means that a party cannot appoint himself, herself, or itself, *see Finkelstein v. Smith,* 326 So.2d 39, 40 (Fla. 1st DCA 1976), nor can a party appoint the party's employee. If a firm is designated to do the appraisal, it must be unaffiliated with the appointing party, that is, it cannot be a firm in which the appointing party has an ownership interest.
>
> The insurer urges us to go farther and rule that an appraiser cannot be "independent" whose pay is based, in whole or in part, on a contingent fee percentage of the award. The insurer contends that a contingent fee arrangement gives the appraiser a direct financial interest in the award, and renders the appraiser not "independent" under this insurance contract. We acknowledge that two courts have accepted this reasoning and forbid contingent fee compensation for a party-appointed designee, either across the board, *see Aetna Cas. & Sur. Co. v. Grabbert,* 590 A.2d 88 (R.I.1991) (arbitration), or based on the language of the insurance policy. *See Central Life Ins. Co. v. Aetna Cas. & Sur. Co.,* 466 N.W.2d 257 (Iowa 1991) (appraisal). We decline to apply those cases here.
>
> First, the appraisal clause now before us states that "[e]ach appraiser shall be paid by the party selecting that appraiser." It does not limit the type of compensation which may be paid. The insurance policy must be read favorably to the insured. *See Berkshire Life Ins. Co. v. Adelberg,* 698 So.2d 828, 830

> (Fla.1997). That being so, we decline to interpret the term "independent" (which is not defined in the policy) to limit the type of compensation which can be paid.
> Second, we think the more workable approach to this issue is found in the Code of Ethics for Arbitrators in Commercial Disputes ("Code of Ethics"), promulgated jointly by the American Arbitration Association ("AAA") and American Bar Association ("ABA"). Canon IIA(1) of the Code states that "persons who are requested to serve as arbitrators should, before accepting, disclose (1) any direct or indirect financial or personal interest in the outcome of the arbitration...." Such disclosure is required of nonneutral as well as neutral arbiters. *See* Code of Ethics, Canon VIIB. The theory is that the disclosure is for the benefit not only of the appointing party, "but also for the benefit of the other parties and arbitrators so that they may know of any bias which may exist or appear to exist." *Id.; see also Commonwealth Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145, 152, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968) (White, J, concurring) (stating that arbitrators should err on the side of disclosure); *Lee v. Marcus,* 396 So.2d at 210, (concealment of relationship between arbitrator and appointing party "reflects, at best, a lack of candor which was totally unacceptable and should not be repeated").
> In this appeal, the insureds concede that the fee agreement with East Coast is based on a contingency fee percentage of the recovery. Since that amounted to a "direct ... financial ... interest in the outcome of the arbitration," Code of Ethics, Canon IIA(1), it follows that there should have been voluntary disclosure.
> The next question is whether a direct or indirect financial interest in the outcome of the arbitration requires the disqualification of a party-appointed arbitrator. Under the Code of Ethics, it does not. *Id.* Canon VIB(2). The balance struck by the Code is that such an interest will not be a basis for disqualification, but it must be disclosed so that the other arbitrators are aware of it before they proceed with their work. In this way, the process will operate on the basis of fair disclosure, and party-appointed appraisers may make full disclosure without fear that the disclosure will serve as a basis for disqualification. "[T]he act of disclosure serves as a cure rather than an excuse for intervention by the courts." *Perez v. Mid–Century Ins. Co.,* 85 Wash.App. 760, 934 P.2d 731, 734 (1997). The approach taken by the Code of Ethics allows the arbitration process to proceed smoothly, with a minimum of preliminary decisions for determination by the court. *See Phillips v. General Accident Ins. Co. of America,* 685 So.2d 27, 29 (Fla. 3d DCA 1996) (enumerating preliminary questions); *Lee v. Marcus,* 396 So.2d at 209–11.
> In the present case, the trial court's instinctive reaction was correct: the existence of a contingent fee agreement for an appraiser is an item which calls for disclosure. For the reasons outlined, however, we quash the order compelling discovery and direct instead that the parties make the disclosures required by the Code of Ethics.

Rios v. Tri-State Insurance Co., 714 So.2d 547 (Fla. 3d DCA 1998).

Florida is not the only state to determine that contingent fee agreements do not destroy an appraiser's "independence". Michigan's appellate court have ruled that a "[c]ontingency-fee agreement does not prevent an appraiser from being "independent" within meaning of statute indicating that a fire-insurance policy in Michigan must provide that, if either party makes a

written demand for appraisal, each party shall select a competent, independent appraiser. *White v. State Farm Fire and Casualty*, 293 Mich. App. 419, 809 N.W.2d 637 (2011).

There are states where a contingency fee is cause for determination that an appraiser is not "independent". By statute in Colorado, "[p]ersons may not act as appraisers or expert witnesses and present expert testimony under contingent fee agreements. (Based on C.R.S.A. § 12–61–712(1)(b) making this illegal). *City and County of Denver, Colo. v. Board of Assessment Appeals of State of Colo.* , 947 P.2d 1373 (1997).

D. Binding Nature of Appraisal

The very language of most appraisal clauses states that the appraisal is binding on the parties. "Judicial review of an appraisal award is generally limited in scope to fraud, corruption or misconduct that caused an unjust result. However, courts may also review an appraisal award on the basis of the scope of the appraiser's authority and whether she has exceeded it." Johnny Parker, *Understanding the Insurance Policy Appraisal Clause: A Four-Step Program*, 37 U. Tol. L. Rev. 931, 946. See also, *Emmons v. Lake States Ins. Co.,* 193 Mich.App. 460, 466, 484 N.W.2d 712 (1992) (Judicial review of the appraisal process is limited to "instances of bad faith, fraud, misconduct or manifest mistake."); *Boulevard Associates v. The Seltzer Partnership*, 445 Pa.Super. 10, 664 A.2d 983 (1995) (judicial review of appraisal is limited to fraud, misconduct, corruption or other irregularity causing an unjust result.); *Munn v. National Fire Insurance Company of Hartford*, 237 Miss. 641, 115 So.2d 54 (1959) (it is elementary law that an appraisal is presumptively correct, but it is also the law that the court may set aside the appraisal where the award is so grossly inadequate or excessive as to amount to a fraud in effect, although fraud is not charged, or where the appraisers were without authority, or where there is a mistake of fact or to prevent injustice); *Stuckman v. Westfield Ins. Co.,* 968 N.E.2d 1012 (Ohio App. 2011) ("A court's review of an appraisal is extremely limited. Generally, a court should not interfere with an appraisal award absent fraud, mistake, or misfeasance.)

The existence of impeaching circumstances is to be determined on a case by case basis. *Harleysville Mut. Ins. Co. v. Narron*, 155 N.C.App. 362, 574 S.E.2d 490 (2002). As an example of impeaching circumstances that would justify overturning an appraisal, where the insurance company's appraiser met with the umpire "secretly and without notice to or knowledge of the plaintiff or her representative * * * and for the purpose of unlawfully and fraudulently reaching a figure for the loss lower than the actual amount the resulting appraisal was invalid because the umpire met exclusively with one parties' appraiser without presence or notice to the other. *Zoni v. Importers & Exporters Ins. Co.,* 338 Pa. 165, 12 A.2d 575 (1940). It is important to note, however, that "mistakes by appraisers, like those made by arbitrators, are insufficient

"to invalidate an award fairly and honestly made." *North Carolina Farm Bureau Mutual Insurance Company v. Harrell,* 148 N.C.App. 183, 557 S.E.2d 580 (2001).

III. **CONCLUSION**

While only a representative look at the cases and commentators interpreting the appraisal process, there are several constants, regardless of jurisdiction. Appraisal is a process limited to determinations of value. Issues of coverage and liability are not proper for appraisers to decide. Appraisal is a process that can be waived by the passage of time or engaging in the litigation process so determinations about engaging in the process should be made at the earliest possible time. Finally, absent extraordinary circumstances the appraisal process is binding on the parties. Fully understanding appraisal the appraisal provision in an insurance policy can make it an excellent alternative to the cost of litigation if the only issues are questions of value provided it is properly and timely invoked.